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Pretrial motion on death penalty for spies is rejected

By Ed Rogers
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A federal judge who will preside over a Navy spy trial in Norfolk has rejected a motion to find the death penalty constitutional in peacetime espionage cases.

Retired Lt. Cmdr. Arthur James Walker, 50, goes on trial on Aug. 5 on charges of violating a federal espionage law that includes a death penalty provision that is widely believed to have been voided by a 1972 Supreme Court ruling.

The Washington Legal Foundation, a 200,000-member public interest group, and eight congressmen urged U.S. District Judge J. Calvitt Clarke Jr. to set the record straight and rule that Mr. Walker could be sentenced to death if found guilty.

The Supreme Court did not void the death penalty for peacetime espionage, as widely believed, in overturning "arbitrary" state death statutes, the group contended.

However, Judge Clarke ruled that its brief was inadmissible.

"The court is of the opinion that competent counsel represent the government and the defendant and that they are fully capable of representing the best interests of the public and the defendant," Judge Clarke said.

The foundation and the same congressmen had filed a similar motion in the case of John Walker Jr., 47, brother of Arthur Walker, and John Walker's son Michael, 22, who face trial next October on espionage charges in Baltimore.

U.S. District Judge Alexander Harvey II has accepted their brief in that case but has not ruled on the merits of its arguments in behalf of the death penalty in peacetime espionage cases.

Paul D. Kamenar, the foundation's executive legal director, said he is considering filing a similar motion in the case of Jerry Whitworth, 45, the fourth defendant in the Walker

spy-ring case, who faces trial in San Francisco.

The foundation also is considering similar filings in the cases of Sharon M. Scranage, a former CIA clerk in Ghana, and Michael Sous-soudis, a Ghanaian national, who face trial in Alexandria, Mr. Kamenar said.

"We are the only public interest group that regularly battles the ACLU [American Civil Liberties Union] and the NAACP [National Association for the Advancement of Colored People] on death penalty issues," he said. "Consequently, we felt it was incumbent upon us to make a legal argument that no one else has made in these cases."

The foundation said in its brief that it "strongly believes that capital punishment serves the valid principles of punishment, retribution and deterrence."

"The provision is still on the books, but there has been an erroneous belief in the legal community

that a 1972 Supreme Court decision struck down all death penalty laws, but it did not do that," Mr. Kamenar said.

The Supreme Court, in ruling on three cases captioned *Furman vs. Georgia*, held, 5-4, that "the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and 14th Amendments."

The court's opinion "makes it clear that only those cases before the court were being addressed," the brief says.

The Supreme Court was concerned about the arbitrary imposition of the death penalty on racial or other grounds in murder or rape cases — a concern that is not likely to apply to a spy case — the brief says.

The last time the death penalty was imposed in the United States for espionage was in 1952 when Julius and Ethel Rosenberg were executed for passing secrets about the atomic

bomb to the Soviet Union.

The foundation maintains that absence of the death penalty in espionage cases may be responsible for the increase in the number of arrests on spying charges.

From 1965 to 1972, no Americans were charged with espionage, but 38 people have been arrested since then, Mr. Kamenar said.

The death penalty issue arose in San Francisco last year in the case of James D. Harper, who was accused of selling military defense secrets to the Soviets. A federal district judge ruled the death penalty was available, but he was overruled by the 9th U.S. Circuit Court of Appeals.

This ruling raises difficulties in filing a death penalty motion in the Whitworth case in San Francisco because the trial judge would be bound by the appellate decision, Mr. Kamenar said.

Rather than filing the foundation's standard motion, Mr. Kamenar

said, he may try to persuade the U.S. attorney in San Francisco to raise the issue. The government could then appeal an adverse ruling to the Supreme Court.

However, the Justice Department took the position in the Harper case that the death penalty provision in the espionage statute was unconstitutional.

Mr. Kamenar said Judge Clarke's decision in Norfolk was a "slap in the face of the members of Congress who are pleading with the court to uphold the law."

"We are disappointed that the court is afraid or reluctant to hear the viewpoint of all legal arguments," he said.

Tommy Miller, assistant U.S. attorney, said he would not seek the death penalty against Arthur Walker.

"Congress has not passed the procedures that can be applied to get the death penalty," he said.

Brian Donnelly, one of Mr. Walker's two court-appointed attorneys, said he was upset about the filing of the death penalty brief. "It just contributed to the hysteria," he said.